STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE ARBITRATION OF: QWEST CORPORATION, Petitioning Party, vs. AT&T COMMUNICATIONS OF THE MIDWEST, INC., AND TCG OMAHA, Responding Parties.	DOCKET NO. ARB-04-1

ARBITRATION ORDER

(Issued June 17, 2004)

PROCEDURAL HISTORY

On February 9, 2004, Qwest Corporation (Qwest) filed with the Utilities Board (Board) a petition for arbitration of an interconnection agreement pursuant to Section 252(b) of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the Act), and 199 IAC 38.7(3). Qwest requests arbitration of the terms, conditions, and prices for interconnection and related arrangements with AT&T Communications of the Midwest, Inc., and TCG Omaha (collectively, AT&T). In addition to its request for arbitration, Qwest requested a hearing on the issues. This petition for arbitration has been identified as Docket No. ARB-04-1.

According to the petition, Qwest formally requested negotiations with AT&T on September 17, 2003, to produce a new interconnection agreement to replace the agreement between AT&T Communications of the Midwest, Inc., and Qwest that was approved by the Board on May 15, 1998, in Docket No. AIA-96-1 (ARB-96-1), and the agreement between TCG Omaha and Qwest that the Board approved on September 30, 1998, in Docket No. NIA-98-23. Pursuant to 47 U.S.C. § 252(b)(1), either the incumbent local exchange carrier (ILEC) or the requesting carrier may petition a state commission to arbitrate any open issues by filing a request during the time period of 135 to 160 days after the date on which the request for negotiations was received.

On February 24, 2004, the Board issued an order docketing the petition for arbitration and scheduled a prehearing conference. AT&T filed its response to the arbitration petition on March 3, 2004.

A prehearing conference was held by telephone on March 4, 2004, at 10 a.m. Representatives from the Board staff, the Consumer Advocate Division of the Department of Justice (Consumer Advocate), Qwest, and AT&T participated in the call. Due to conflicts with proposed hearing dates, Qwest and AT&T stated in the conference call that they intended to file a joint motion and request a waiver of the requirement in 199 IAC 38.7(3)"h" that a hearing be commenced within 60 days of the petition for arbitration. That motion and request was filed on March 17, 2004. On

March 18, 2004, the Board issued an order granting the waiver and establishing a procedural schedule.

On April 8, 2004, the parties to the arbitration filed a joint motion to waive their rights to a hearing and to modify the procedural schedule. The Board issued an order on April 14, 2004, which addressed the joint motion. The Board cancelled the hearing, requested written responses by April 21, 2004, to the Board questions attached to the order, and modified the procedural schedule by requiring simultaneous briefs to be filed on April 26, 2004.

The Board notes that pursuant to 199 IAC 38.7(3)"j," a preliminary written decision on unresolved matters is to be issued “following the hearing.” By waiving their right to a hearing, the parties have, therefore, also waived their right to a preliminary post-hearing decision and this arbitration order will be the Board’s final decision in this proceeding, subject only to requests for rehearing or reconsideration.

On April 19, 2004, Qwest filed a motion to modify the Board’s April 14, 2004, order by extending the deadlines for filing written responses to the Board’s questions to April 26, 2004, and for filing simultaneous briefs to April 30, 2004. An order granting the motion was issued on April 20, 2004.

Both parties filed briefs on April 30, 2004.

STANDARD FOR ARBITRATION AND REVIEW

This arbitration was conducted pursuant to 47 U.S.C § 252, which states in part:

> (c) STANDARDS FOR ARBITRATION.—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement a State commission shall—
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> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
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> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
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> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. Section 252(c).

47 U.S.C. § 252(c).

Additionally, 47 U.S.C. § 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted to the state commission for approval. Section 252(e)(2)(B) provides that a state commission may reject any portion of an interconnection agreement adopted by arbitration "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> (3) PRESERVATION OF AUTHORITY.—Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

UNRESOLVED ISSUES

Only a small number of issues remain to be resolved by the Board.

Unresolved issues include:

Issue 5: Definition of Exchange Service (Section 4.0)

Issue 14: Trunking Requirements and a DS-1's Worth of Traffic (Section 7.2.2.9.6)

Issue 15: Reciprocal Compensation—Cost of Interconnection Transport and Termination (Section 7.3.1(b))

Issue 16: Reciprocal Compensation—Application of Relative Use Factor to Private Line Facilities (Section 7.3.1.1.2)

Issue 17: Inclusion of ISP-bound Traffic in Relative Use Calculations, AT&T's "Comparable Facilities" Language, and Adjustments to Traffic Volumes. (Sections 7.3.1.1.3.1 and 7.3.2.2.1)

Issue 35: Pricing (Section 22)

The Board will discuss each of these issues separately.

Issue 5: Definition of Exchange Service (Section 4.0)

This issue concerns the classification of certain calls that AT&T describes as foreign exchange-like (FX-like) services that cross local calling area boundaries. Ultimately, the question is whether these allegedly "FX-like" calls are properly included within the definition of "Exchange Service." This definition is used to determine if a call is classified as a local call and, thus, whether reciprocal compensation applies. Qwest contends that since these "FX-like" calls cross between local calling areas, they should be subject to toll charges and access charges and should not be included in the definition of Exchange Service. AT&T

argues that if “1+” is not used when dialing the call, these calls should be considered local and subject to reciprocal compensation. AT&T’s proposed definition of Exchange Service, therefore, includes this traffic.

Qwest proposes the following definition for “Exchange Service”:

> “Exchange Service” or “Extended Area Service (EAS)/Local Traffic” means traffic that is originated and terminated within the same Local Calling Areas as determined for Qwest by the [Board].

AT&T’s proposed definition adds to Qwest’s definition. The additional language proposed by AT&T is underlined:

> “Exchange Service” or “Extended Area Service (EAS)/Local Traffic” means traffic that is originated and terminated within the same Local Calling Areas as determined for Qwest by the [Board]. <u>This definition shall not affect compensation for the exchange of FX and FX-like Traffic.</u>
>
> <u>“FX and FX-like Service” means service provided to an End User Customer under which such customer is assigned a number associated with a rate center in which the customer is not physically located. Traffic exchanged in the provision of such service is FX or FX-like Traffic.</u>
>
> <u>7.3.4.3.1 When either Party provides FX or FX-like Service, the Parties shall compensate one another for the exchange of such traffic as follows: (i) FX and FX-like voice traffic shall be compensated at the same rate as non-FX and non-FX-like voice traffic (e.g., if 1+ is not dialed to complete the call, local rates apply), and (ii) ISP-bound-FX and FX-like traffic shall be compensated as ISP-bound traffic pursuant to Section 7.3.6.</u>

Iowa Code § 477.10 defines local exchange with a geographical point of view as “a telephone line or lines . . . furnishing telephonic communication between two or more members of the public within the same city, village, community, locality or neighborhood . . ." Additionally, 199 IAC 22.1(3) defines local service as a "telephone service furnished between customers or users located within an exchange area," while interexchange service is defined as "the provision of intrastate telecommunications services and facilities between local exchanges, and does not include EAS." Qwest's proposed language would treat traffic as local only if the originating and terminating traffic is within the same local calling area, so it appears to be consistent with the Board's rules.[1]

Further, under the Central Office Code Assignment Guidelines (COCAG),[2] Section 2.14 specifies industry standards for rating and routing calls. This section states:

> It is assumed from a wireline perspective that CO [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. Exceptions exist, for example tariffed services such as foreign exchange service.

This section was referred to in the Board's order in *Re: Sprint Communications Company L.P. and Level 3 Communications, LLC*, Docket Nos. SPU-02-11 and SPU-02-13, "Final Decision And Order" (June 6, 2003). The Board determined in that case that virtual NXX (VNXX) calls (which appear to be included in the "FX-like" calls at issue here) are not local services but interexchange in nature. In its order, the

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[1] There are recognized exceptions to these rules, including true foreign exchange service and extended area service, but, as described below, AT&T's alleged "FX-like" services have not been shown to fit within any of these exceptions.

[2] The COCAG is distributed by the Alliance for Telecommunications Industry Solutions, a sponsor of Industry Numbering Committee (INC).

Board stated that the INC's COCAG "proceed from the assumption that wireline local telephone numbers will be used in the exchange to which they are assigned." The Board concluded that VNXX services do not meet this guideline, nor are they a tariffed service, and therefore they are not local exchange services. [3]

It is informative that in the Qwest states where this issue has been arbitrated, all state commissions that have concluded proceedings have adopted Qwest's definition. Although AT&T's proposed language in Iowa differs from the language it proposed in other states, it appears the effect of the language would be the same. Commissions in Minnesota, Colorado, Washington, Arizona, and Utah have issued decisions adopting Qwest's definition of Exchange Service. Two other states, Oregon and Nebraska, have recommended decisions from their arbitrators that recommend adopting Qwest's definition. In addition, in six other Qwest states that did not involve arbitration, AT&T agreed to Qwest's language for Exchange Service.[4] These states include Idaho, Montana, New Mexico, North Dakota, South Dakota, and Wyoming.

Further, AT&T's proposal is overly broad and could have unforeseen consequences and implications. Several states have alluded to this in their respective arbitration decisions. For example, the Washington commission stated, "AT&T's alternative simply goes too far – is too sweeping in its implications – to be

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[3] Final Decision And Order, pp 9-10.
[4] Freeberg Rebuttal at pp. 5-6.

adopted on the record in this proceeding."[5] The Minnesota commission order stated that AT&T's definition could "impinge upon the operations of other carriers, affect application of reciprocal compensation and access charges, and have unexplored consequences for enhanced 911 service routing, numbering resource conservation, and local number portability."[6]

Adopting AT&T's language would affect more than just the parties to this arbitration. While AT&T may be willing to state that it will assign numbers in the rate center of the customer's location,[7] there are no such limits in its proposed language. Other carriers could adopt this agreement and assign numbers across the state or outside Iowa. Thus, AT&T's language would allow a potential for abuse of numbering resources.

The Board disagrees with AT&T's position that its allegedly FX-like service is the same as Qwest's retail FX service. By subscribing to Qwest's FX service, the FX customer pays Qwest at an interexchange rate for the service the customer receives as a substitute for the toll charges that would otherwise be due and to compensate

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[5] Final Order Affirming Arbitrator's Report and Decision; Approving Interconnection Agreement, *Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle With Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. UT-033035, Order No. 05 (WUTC Feb. 6, 2004) (Washington Arbitration Order) at ¶¶ 15-16.

[6] Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement, *Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, MPUC Docket No. P-442, 421/IC-03-759 (MN PUC Nov. 18, 2003) (MN Order) at p. 14.

[7] Schell Rebuttal at p. 25.

Qwest for the transport it provides.[8] The calling party avoids the toll charge to call the foreign exchange, but the called party, by virtue of the FX rate they pay, absorbs the cost. This is not the same as AT&T's "FX-like" service, where neither the called party nor the calling party pays for transporting the call. The Board is concerned that AT&T's proposal may violate cost-causation principles.

As indicated in its responses to the Board's questions, AT&T does not currently offer and does not intend to offer this FX-like service in the state of Iowa.[9] TCG also stated it does not offer these services in Iowa.[10] AT&T's argument that it wishes to compete with Qwest's FX service falls short in light of the fact that it does not intend to offer its proposed service in Iowa. Additionally, Qwest has less than one-tenth of 1 percent of its Iowa lines (520 customers as of December 31, 2003) that utilize FX service from Qwest.[11] Thus, it appears from the Qwest witness's testimony that the market for true FX service is very small and the likelihood of any new carrier entering this market is correspondingly small.

For each of these reasons, the Board will adopt Qwest's proposed definition of Exchange Service as follows:

> Section 4.0—"Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the same Local Calling Area as determined for Qwest by the Board.[12]

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[8] Freeberg Direct at pp. 46-47.
[9] See Responses to Questions 2 and 6, AT&T's Responses to Board Questions in Lieu of Hearing, April 26, 2004.
[10] See Responses to Questions 3 and 5, AT&T's Responses to Board Questions in Lieu of Hearing, April 26, 2004.
[11] Freeberg Direct at p. 45.
[12] Qwest's proposal was changed to include the term "Board" rather than "Commission."

Issue 14: Trunking Requirements and a DS-1's Worth of Traffic (Section 7.2.2.9.6)

The Minnesota Arbitrators' Report provides a useful review of this issue.[13] The 1996 Act requires all telephone carriers to interconnect their networks so that customers of one carrier can call customers of another carrier. Qwest's network has a number of end-office switches connected to subscribers and a smaller number of tandem switches connecting multiple end-office switches to one another and to other tandems using cables called "trunks." Conceptually, tandem switches are closer to the center of the network "web," with lines radiating out to the end-office switches, which in turn have lines radiating out to retail customers.

The network's operations can be influenced by where a CLEC connects to the network. To minimize the number of interconnection points, a CLEC may prefer to interconnect with one of Qwest's tandem office switches to facilitate distribution of the CLEC's calls over the broadest area. This consumes some tandem switch resources for every call. Interconnections closer to where a CLEC's traffic will terminate will consume less of Qwest's system resources but may require additional interconnection points and increase the interconnection costs.

[13] Arbitrators' Report, *Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, MPUC Docket No. P-442, 421/IC-03-759, (MN Arbitrators' Report) (issued May 18, 2004) at pp. 28-30.

The language proposed by Qwest would allow Qwest to request that AT&T establish a direct trunk line to a switch whenever a threshold traffic level has been met. Qwest's proposal is as follows:

> Section 7.2.2.9.6—CLEC may interconnect at either the Qwest local tandem or the Qwest access tandem for the delivery of local exchange traffic. When CLEC is interconnected at the access tandem and where there would be a DS-1's worth of local traffic (512 CCS) between CLEC's Switch and those Qwest end offices subtending a Qwest local tandem, CLEC will order a trunk group to the Qwest local tandem. When a direct trunk group to Qwest's local tandem is required, the additional cost of the trunk group shall be offset by other network savings.

AT&T proposes the following language (changes to Qwest's proposal are shown):

> Section 7.2.2.9.6—CLEC may interconnect at either the Qwest local tandem or the Qwest access tandem for the delivery of local exchange traffic. When CLEC is interconnected at the access tandem and where there would be a DS1's worth of local traffic (512 CCS <u>in the busy hour</u>) between CLEC's Switch and those Qwest end offices subtending a Qwest local tandem, CLEC will order a trunk group to the Qwest local tandem <u>when it is cost effective for CLEC to do so.</u> ~~When a direct trunk group to Qwest's local tandem is required, the additional cost of the trunk group shall be offset by other network savings.~~

This issue has been addressed by at least three other states, Minnesota, Arizona, and Utah.[14] Both Minnesota and Arizona accepted Qwest's proposed language, which agreed with the language in their respective statements of generally

[14] Opinion and Order, Petition of AT&T Communications of the Mountain States, Inc., and TCG Phoenix, for Arbitration with Qwest Corporation, Inc. Pursuant to 47 U.S.C. Section 252(b), Docket Nos. T-02428A-03-0553, T-01051B-03-0553, Decision No. 66888, Arizona Corp. Comm. Apr. 6, 2004) and Arbitrator's Report, Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an

accepted terms and conditions (SGATs)[15] that were approved during their respective reviews of Qwest's 271 application pursuant to 47 U.S.C. § 271(c)(1)(B), noting that the Qwest proposal does not require AT&T to interconnect at multiple or inefficient points.[16] The Arizona Commission also notes that AT&T is not forced to order a direct trunk group if it will impose a material adverse impact and that during any dispute, the status quo is maintained.[17] The accepted language in Minnesota and Arizona is similar to that proposed here.

In Utah, the Public Service Commission of Utah accepted part of Qwest's proposed language, but determined that if Qwest believes direct trunking is appropriate or required in a particular situation, the burden should be on Qwest "to establish the difficulties of interconnection without direct trunking because of the adverse impact on Qwest's network and operations; not on AT&T to establish the impact on its network and operations."[18]

Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b), MPUC Docket No. P442, 421/IC-03-759, OAH Docket No. 12-2500-15429-4 (Aug. 18, 2003).

[15] 47 U.S.C. § 252(f) provides in part:

> (1) IN GENERAL.—A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the 4regulations thereunder and the standards applicable under this section.

This Statement of Generally Available Terms and Conditions (SGAT) is required pursuant to 47 U.S.C. § 271(c) to show the specific terms and conditions under which the Bell operating company is generally offering to provide access and interconnection to its network facilities.

[16] Opinion and Order, *Petition of AT&T Communications of the Mountain States, Inc., and TCG Phoenix, for Arbitration with Qwest Corporation, Inc., Pursuant to 47 U.S.C. Section 252(b)*, Docket Nos. T-02428A-03-0553, T-01041B-03-0553, Decision No. 66888, (AZ Corp. Comm. April 6, 2004) (Arizona Opinion And Order) at p. 16 and MN Order at p. 20.

[17] Arizona Opinion And Order at p. 16.

[18] Arbitration Report and Order, *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T Communications of the Mountain States, Inc. and TCG Utah,* Docket No. 04-049-09, at p. 14.

Qwest has noted that it proposed the language approved in its Iowa SGAT when negotiations between AT&T and Qwest did not reach agreement on this issue.[19] This approach was chosen as a fallback position because this language has been reviewed and approved in the Board's review of Qwest's 271 application. Qwest also noted that there have been no new facts or law affecting the Board's prior determinations on its SGAT language.[20]

AT&T, in its testimony, questioned whether Qwest experienced tandem exhaust in Iowa.[21] While Qwest did not directly present examples of any such tandem exhaust, AT&T did not pursue this argument on brief. Moreover, the current level of general tandem exhaust may not be the most relevant factor here; future traffic levels in specific locations may be more important.

AT&T is correct in stating that Qwest must allow interconnection by a CLEC at any technically feasible point.[22] The point of interconnection (POI) is important. A carrier affects its own network costs as well as the amount of reciprocal compensation it pays by choosing where to interconnect. However, Qwest's proposed language does not prohibit AT&T from interconnecting at any technically feasible point. The language merely allows Qwest to maintain system integrity if the point chosen by AT&T reaches a certain level of traffic.

[19] Freeberg Direct at p. 64.
[20] Id. at pp. 64-65.
[21] Shell Direct at p. 57.
[22] 47 C.F.R. § 51.305(a)(2).

A minor issue that was not addressed in either brief was whether the DS-1 threshold of 512 CCS is a busy hour requirement or a standard that applies at all times. In its response to the Board questions, Qwest agreed that the Board should accept AT&T's modification to Qwest's language to include the words 'in the busy hour' after '512 CCS.'

The Board will adopt the following language:

> Section 7.2.2.9.6—CLEC may interconnect at either the Qwest local tandem or the Qwest access tandem for the delivery of local exchange traffic. When CLEC is interconnected at the access tandem and where there would be a DS-1's worth of local traffic (512 CCS in the busy hour) between CLEC's Switch and those Qwest end offices subtending a Qwest local tandem, CLEC will order a trunk group to the Qwest local tandem. When a direct trunk group to Qwest's local tandem is required, the additional cost of the trunk group shall be offset by other network savings.

Issue 15: Reciprocal Compensation—Cost of Interconnection Transport and Termination (Section 7.3.1(b))

Issue 16: Reciprocal Compensation—Application of Relative Use Factor to Private Line Facilities (Section 7.3.1.1.2)

At the heart of the disagreement related to these issues is whether AT&T can charge Qwest reciprocal compensation for Qwest-originated local traffic carried over a private line transport service (PLTS) leased by AT&T from Qwest. Because of this common question, Issues 15 and 16 should be considered together.

The parties have been unable to reach agreement regarding the cost of interconnection transport and termination when PLTS is used for interconnection. Issue 15 involves Qwest's proposed language to exclude PLTS from the cost sharing associated with flat-rated transport underlying two-way local trunk groups. Issue 16 involves application of a relative use factor for PLTS purchased from a tariff. If Issue 15 is resolved in Qwest's favor, then Issue 16 is moot.

PLTS is generally purchased for the purpose of transporting long distance traffic, not local traffic. However, there is idle capacity available on this service from time to time. AT&T is allowed to use this idle capacity for local traffic. AT&T thereby avoids the purchase of other services meant specifically for transport of local traffic. In addition to avoiding the purchase of other services, AT&T believes it is entitled to fair compensation for the portion of the capacity used for Qwest local traffic being transported to AT&T, since AT&T has paid to lease that capacity.

AT&T states Qwest should compensate AT&T for that portion of a private line facility that AT&T leases from Qwest and over which Qwest sends local traffic to AT&T for termination.[23] AT&T proposes two methods for cost recovery: bill credit or AT&T would submit a bill for the cost of the facilities used.[24] A relative use factor for private line is used by other states and would provide symmetrical reciprocal compensation obligations for both parties.

Qwest states AT&T purchases private line facilities primarily to carry its long distance traffic. AT&T receives a benefit when it uses any spare capacity to carry local traffic, as AT&T avoids the cost of procuring other services.

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[23] Schell Direct pp. 60-62.
[24] Schell Rebuttal at p. 55.

Qwest asserts that AT&T's proposal is a form of ratcheting and thus is a violation of federal law and that a relative use factor should not be applied to previously purchased Qwest Private Line Transport Service that is purchased out of Qwest's federal and state tariffs.[25] In a recent order, the Arizona Corporation Commission stated:

> AT&T's proposal to expand this section to encompass "other comparable facility providing equivalent functionality" would apply the relative use calculation to PLTS. AT&T purchases PLTS out of a federally approved tariff. The application of a relative use factor to PLTS would alter the tariffed rate for these facilities, contrary to the terms of the tariff and in violation of the FCC's rejection of ratcheting.[26]

The application of a relative use factor would also have several implementation issues.[27]

Oregon, Colorado, and Arizona determined that in these circumstances, there are no costs to share because AT&T is using excess capacity. As the Colorado Commission found, AT&T is not forced to provide Qwest with transport facilities:

> [i]f Qwest's SGAT did not allow AT&T to opt to carry local traffic over spare capacity in facilities that it leases to carry long distance traffic, AT&T would incur additional costs to lease facilities to carry that local traffic. The Commission is not forcing AT&T to provide Qwest with a free ride. AT&T makes a choice not to lease additional facilities to carry local traffic, but instead to carry that local traffic over spare capacity in its already leased PLTS facilities.[28]

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[25] Freeberg Rebuttal at pp. 30-37.
[26] Arizona Opinion And Order at p. 22.
[27] Freeberg Direct at pp. 74-76.
[28] Decision Granting, In Part, Application for Rehearing, Reargument, or Reconsideration, *Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b)*, Dkt. No. 03B-287T, Decision No. C03-1352 (Colo. PUC Dec. 4, 2003) (Colorado Arbitration RRR Decision) at ¶ 21.

Washington concluded it had no jurisdiction over federal tariffs and AT&T's proposal was rejected because it would result in a reduced rate for federal access services.[29] In Nebraska the recommendation of the Arbitrator noted:

> Finally, the arbitrator agrees with Qwest that since Qwest is not assessing a charge to AT&T when AT&T uses PLTS to exchange local traffic, there are no costs to share. Because AT&T has purchased the PLTS for its own purpose, AT&T pays no more if it chooses to use this option for exchanging local traffic. Clearly, by AT&T choosing this option, it avoids additional costs.[30]

Minnesota is the only state that has adopted AT&T's position on this issue. Minnesota states there are costs AT&T incurs, the cost of the PLTS, which should be charged to Qwest.[31] Minnesota did not believe that services bought from a federal tariff could not be 'rented back' to Qwest. However, Minnesota did not address the relative use factor.

Qwest's proposed language is:

> Section 7.3.1(b)—If flat-rated transport is necessary to support two-way trunking of Exchange Service, then the cost of the flat-rated transport is shared by Qwest and CLEC based on directional relative use. When a CLEC elects to employ a portion of a Qwest Tariffed private line transport system to support a local trunk group, the local transport is added at no additional cost to the CLEC. A relative use factor emulates the costs Carriers would otherwise face if

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[29] Washington Arbitration Order at ¶ 19.

[30] Arbitrator's Recommended Decision, *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T Communications of the Midwest, Inc. and TCG Omaha*, Docket No. C-3095 (May 4, 2004) (Nebraska Arbitrator's Recommended Decision) at p. 26.

[31] Arbitrator's Report, *Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, MPUC Docket No. P442, 421/IC-03-75, OAH Docket No. 12-2500-15429-4 (Aug. 18, 2003).

> one-way trunking had been employed. In general, the terminating Party charges the originating Party for switching and common transport (if any) starting from the terminating Carrier's end of the flat-rated transport to the terminating end office.

AT&T objects to the second sentence in the Qwest proposal by which Qwest seeks to exclude private line transport from the preceding sentence, which establishes a cost-sharing rule for all two-way flat-rated transport. AT&T concedes that the Qwest sentence, standing alone, is true. However, AT&T objects because by placing the sentence in this paragraph, Qwest is asserting that it will not share the cost of this facility when Qwest sends its own originating traffic over the facility. AT&T argues that it should not be forced to provide Qwest with a free ride for the privilege of employing trunking facilities, in this case PLTS, in an efficient manner consistent with the use contemplated by the SGAT.

The Board notes that if Qwest's SGAT did not allow AT&T to opt to carry local traffic over spare capacity on facilities that AT&T leases to carry long distance traffic, AT&T would incur additional costs to lease facilities to carry its local traffic. By approving Qwest's proposed language, the Board is not forcing AT&T to give Qwest a free ride. AT&T makes a choice not to lease additional facilities to carry local traffic, but instead to carry that local traffic over spare capacity in its already-leased PLTS facilities.

The Board will adopt the language proposed by Qwest, as follows:

> Section 7.3.1(b)—If flat-rated transport is necessary to support two-way trunking of Exchange Service, then the cost

> of the flat-rated transport is shared by Qwest and CLEC based on directional relative use. When a CLEC elects to employ a portion of a Qwest Tariffed private line transport system to support a local trunk group, the local transport is added at no additional cost to the CLEC. A relative use factor emulates the costs Carriers would otherwise face if one-way trunking had been employed. In general, the terminating Party charges the originating Party for switching and common transport (if any) starting from the terminating Carrier's end of the flat-rated transport to the terminating end office.
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> Section 7.3.1.1.2—If CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs, the rates from those Tariffs will apply. Such a facility is not an Interconnection Entrance Facility. Therefore, Qwest is not entitled to an Interconnection Entrance Facility charge when CLEC elects to place Interconnection trunking onto the spare capacity of an existing Private Line Transport Service circuit.

Because Issue 15 is decided in favor of Qwest, Issue 16 is moot.

Issue 17: Inclusion of ISP-bound Traffic in Relative Use Calculations, AT&T's "Comparable Facilities" Language, and Adjustments to Traffic Volumes. (Sections 7.3.1.1.3.1 and 7.3.2.2.1)

Both AT&T and Qwest have agreed to apportion and share the cost of the dedicated transport facilities associated with two-way trunk groups. They disagree over what type of facility may be used for the trunk group, whether Internet-bound traffic should be excluded from the calculation of the relative use factor,[32] and how the true-up of the relative use factor should function.

[32] Relative use factors are used to designate the percentage of trunks in a trunk group that a carrier will use to carry its traffic. This factor is applied to the cost of the associated facilities in order to apportion the cost between or among the carriers.

AT&T's proposed "comparable facilities" language, which follows, implicates the private line facilities at issue in Issues 15 and 16. AT&T proposes the following language for Section 7.3.1.1.3.1:[33]

> Section 7.3.1.1.3.1—The provider of the two-way Interconnection Entrance Facility (or other comparable facility providing equivalent functionality) (EF) will initially share the cost of the two-way EF by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the Interconnection EF, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data to substantiate a change in that factor. If either Party demonstrates with traffic data that actual minutes of use during quarters governed by the initial relative use factor justify a relative use factor other than fifty percent (50%), the Parties will retroactively true up the quarterly charges. Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter.

AT&T proposes the following language for Section 7.3.2.2.1:[34]

> The provider of the two-way Dedicated Trunk Transport Facility (or other comparable facility providing equivalent functionality) (DTT facility) will initially share the cost of the two-way DTT facility by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the DTT facility, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for

[33] AT&T Response to Qwest Petition For Arbitration of Interconnection Agreement in Docket No. ARB-04-1, p. 5.
[34] Id. at p. 6.

> both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data to substantiate a change in that factor. If either Party demonstrates with traffic data that actual minutes of use during quarters governed by the initial relative use factor justify a relative use factor other than fifty percent (50%), the Parties will retroactively true up the quarterly charges. Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter.

AT&T has requested these parallel issues (Issues 15, 16, and 17) be treated consistently, and the Board agrees. The decisions regarding Issues 15, 16, and 17 should be consistent. Regarding AT&T's proposed "comparable facilities" language, Colorado, Washington, and Arizona have all rejected AT&T's proposed "comparable facilities" language.[35] Likewise, the Arbitrator's Recommended Decision in Nebraska also rejects AT&T's proposed language.[36]

With respect to the exclusion of Internet traffic from the computation of the relative use factor, the FCC has not yet explicitly determined whether or not ISP-bound traffic should be included in relative use calculations. The FCC did not resolve this issue in the context of Qwest's 271 proceeding and has subsequently required state commissions and federal courts to resolve it.[37] As the FCC has not

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[35] Colorado Arbitration RRR Decision at p. 37; Washington Arbitration Order at ¶ 26; and Arizona Opinion and Order at p. 22.

[36] Nebraska Arbitrator's Recommended Decision at p. 32.

[37] Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314, 17 FCC Rcd 26303, Par. 325.

ruled specifically on this issue, the Board will need to decide the issue on the basis of promoting the public interest.

The practical implication of including ISP-bound traffic in the calculation of relative use factors is that Qwest will incur a substantial increase in its apportionment of the costs for the interconnection of trunks and facilities. This outcome would be in violation of section 252(d)(1) of the Act, which requires the setting of "just and reasonable" rates as compensation for the cost of providing interconnection. In its ISP Remand Order,[38] the Federal Communications Commission (FCC) found that payment of reciprocal compensation for Internet-bound traffic under the Telecommunications Act leads to improper subsidies and uneconomic pricing signals, and ignores the ability of CLECs to collect costs from their ISP customers, concluding that these uneconomic incentives arise from the fact that reciprocal compensation permits carriers to recover costs not only from their end-user customers, but also from other carriers.[39] Further, the FCC determined that Internet-bound traffic is not "telecommunications traffic" and, therefore, is not subject to reciprocal compensation under 47 U.S.C. § 251(b)(5).[40]

Regarding the disputed true-up method, AT&T argues that the true-up should be applied beginning with the quarter in which the measurements indicate that the

[38] Order On Remand And Report And Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 and 99-68, 16 FCC Rcd 9151 (2001) (ISP Remand Order), *remanded, WorldCom, Inc., v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).
[39] Id. at paras. 67-76.
[40] Id. at para. 76.

new factor should apply. The Board agrees with AT&T's assertion that its proposal creates more flexibility to adjust the relative use factor to significant shifts in traffic balance over the term of the agreement.

The Board approves the following language:

> Section 7.3.1.1.3.1—The provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the EF, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. If either Party demonstrates with non-ISP-bound traffic data that actual minutes of use during quarters governed by the initial relative use factor justify a relative use factor other than fifty percent (50%), the Parties will retroactively true up the quarterly charges. Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter. Traffic delivered to Enhanced Service providers is interstate in nature.
>
> Section 7.3.2.2.1—The provider of the LIS two-way DTT facility will initially share the cost of the LIS two-way DTT facility by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the DTT facility, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. If either Party demonstrates with non-ISP-bound traffic data that

> actual minutes of use during quarters governed by the initial relative use factor justify a relative use factor other than fifty percent (50%), the Parties will retroactively true up the quarterly charges. Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter. ISP-bound traffic is interstate in nature.

Issue 35: Pricing (Section 22)

This dispute includes two sub-issues relating to pricing in general. First, the parties disagree on the language for Section 22.1, specifically whether the rates in Exhibit A apply to services rendered by AT&T to Qwest as well as to services rendered by Qwest to AT&T. Second, the parties disagree on whether all the rates in Exhibit A should be considered interim rates (Section 22.4).

With respect to the first sub-issue, AT&T proposes to include the following language in section 22.1:

> Section 22.1—In the event that one party charges the other for a service provided under this Agreement, the other Party may also charge for that service or functionality. The rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable Interconnection services when CLEC reciprocally provides such a service or functionality, unless higher rates are justified by CLEC's higher costs for providing the service. In order for an amount charged by one Party to be "equivalent to" an amount charged by the other Party, it shall not be necessary that the pricing structures be identical. Rates, terms and conditions for all other services provided by CLEC are set forth in the applicable CLEC tariff, as it may be modified from time to time.

The Board is concerned that AT&T's proposed language is too vague for inclusion in an interconnection agreement. For example, the literal reading of AT&T's

proposed first sentence does not require “the other Party” to actually provide the service it will charge for. AT&T supporting argument for this sentence is based on a current dispute involving tariffed SS7 messaging.[41] This is not the appropriate docket to address this dispute.

AT&T’s second sentence, which includes the phrase “unless higher rates are justified by CLEC’s higher costs for providing service,” disregards the CLEC’s obligation to substantiate the costs with a cost study. AT&T’s proposed language does not reflect this obligation under the law. 47 C.F.R. § 51.711(b) (2004) states:

> A state commission may establish asymmetrical rates for transport and termination of telecommunications traffic only if the carrier other than the incumbent LEC . . . proves to the state commission on the basis of a cost study using forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC . . . exceed the costs incurred by the incumbent LEC . . . and, consequently, that such [sic] a higher rate is justified.

Qwest argues against AT&T’s proposal to add language permitting the parties to charge each other an amount “equivalent to” the amount charged by the other party for the same service or functionality. Qwest does not object to the concept of equivalent pricing, however, AT&T’s proposed definition of “equivalent to” allows for pricing that is anything but equivalent. The complaint with the third sentence appears to be valid. With regard to this sentence, the Washington Commission determined it would be difficult, if not impossible, to find rates “equivalent” when they are charged

[41] AT&T Brief pp. 18-20.

under different pricing structures. Subsequently, AT&T's proposed language would result in further disputes.[42]

The language proposed for sections 22.4.1 and 22.4.1.1 is identical except that AT&T would exclude the phrase, "and require Board approval" in both sections. The language below shows Qwest's proposed language with the language disputed by AT&T shown in bold:

> 22.4.1—The Parties acknowledge that only some of the prices contained in Exhibit A have been approved by the Board in a cost case. Prices that have not been approved by the Board **and require Board approval** shall be considered interim subject to the following provisions.
>
> 22.4.1.1—Rates reflected on Exhibit A that have not been approved by the Board in a cost case **and require Board approval** and ICB rates shall be considered as interim rates ("Interim Rates") by the Parties, applicable until changed by agreement of the Parties or by order of the Board.

In essence, AT&T has asked the Board for clarification on how to distinguish between the rates that require Board approval and those that do not.

Qwest points out that there are some rates in Exhibit A that do not require Board approval. Specifically, there are rates in Exhibit A that refer to a FCC tariff or FCC guidelines and these rates should not be subject to treatment as interim rates. AT&T suggests that all rates in an interconnection agreement are subject to the Board's authority.[43] Approving the language proposed by Qwest does not prevent

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[42] Arbitrator's Report, *Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle, with Qwest Corporation, Pursuant to 47 U.S.C. Section 252(b),* Docket No. UT-033035, Order No. 4, (WUTC, Dec. 1, 2003) at p. 28.
[43] AT&T Brief at p. 20.

AT&T from bringing a dispute on a particular rate to the Board for resolution. If the Board, based on specific facts before it, made a determination that approval was required, the rate would be classified as interim and a true-up might be in order.

The Board approves Qwest's proposed language for sections 22.1, 22.4.1, and 22.4.1.1 as follows:

> Section 22.1—The rates in Exhibit A apply to the services provided by Qwest to CLEC pursuant to this Agreement. Unless specified otherwise in this Agreement, the rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable interconnection services when CLEC reciprocally provides such a service or functionality. Rates, terms and conditions for all other services, not related to interconnection, are set forth in the applicable CLEC tariff, as it may be modified from time to time. CLEC shall provide a Qwest-designated representative with electronic notice of filings of such applicable CLEC tariff at the same time they are filed with the Board.
>
> 22.4.1—The parties acknowledge that only some of the prices contained in Exhibit A have been approved by the Board in a cost case. Prices that have not been approved by the Board and require Board approval shall be considered interim subject to the following provisions.
>
> 22.4.1.1—Rates reflected on Exhibit A that have not been approved by the Board in a cost case and require Board approval and ICB rates shall be considered as interim rates ("Interim Rates") by the Parties, applicable until changed by agreement of the Parties or by order of the Board.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The interconnection agreement between Qwest Corporation and AT&T Communications of the Midwest, Inc., and TCG Omaha shall incorporate the language adopted by the Board in this Arbitration Order.

2. Within 30 days of the issuance of this order, the parties shall submit an interconnection agreement consistent with the terms of this Arbitration Order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Sharon Mayer
Executive Secretary, Assistant to

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 17th day of June, 2004.